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Nos. 03-1116, 03-1120, 03-1274

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association, Inc. (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* in

support of the position of the Petitioners and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).[1] This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

INTEREST OF THE *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the 19 jurisdictions[2] that directly control the distribution and sale of alcohol beverages through the operation of state-owned wholesale and, in some cases, retail outlets; these jurisdictions also regulate the sale of alcohol beverages by private outlets such as package stores, restaurants and taverns. NCSLA is an unincorporated membership association whose members are the remaining jurisdictions that simply regulate private sellers of alcohol beverages. Some jurisdictions are members of both organizations. Taken together, NABCA and NCSLA represent the state, and, in some cases, local government agencies charged with regulating the distribution and sale of alcohol

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[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

[2] NABCA's members include the Alabama Alcoholic Beverage Control Board, Idaho State Liquor Dispensary, Iowa Alcoholic Beverages Division, Maine State Liquor & Lottery Commission, Michigan Liquor Control Commission, Mississippi State Tax Commission, Montana Department of Revenue Liquor Division, Montgomery County (MD) Department of Liquor Control, New Hampshire State Liquor Commission, North Carolina Alcoholic Beverage Control Commission, North Carolina Association of ABC Boards, Ohio Division of Liquor Control, Oregon Liquor Control Commission, Pennsylvania Liquor Control Board, Utah Department of Alcoholic Beverage Control, Vermont Department of Liquor Control, Virginia Alcoholic Beverage Control Board, Washington State Liquor Control Board, West Virginia Alcoholic Beverage Control Administration and Wyoming Department of Revenue Liquor Division.

beverages in all 50 states. Several of these agencies are or have been defendants in litigation similar to the instant case and all would have their ability to regulate alcohol beverages significantly impacted by the decision in this matter.

SUMMARY OF ARGUMENT

The plain language as well as the judicial interpretation of the Twenty-First Amendment clearly supports the validity of the state laws that are under attack herein. Further, a state's regulation of the interstate shipment of alcohol beverages directly to its consumers is an inherent part of a state's structure of its alcohol beverage industry, a function that clearly falls within the so-called "core" powers of the Twenty-First Amendment and that also acts to immunize a state's action from Commerce Clause scrutiny.

Alternatively, even if one accepts the premise that a state's regulation is precluded by the Commerce Clause, one must consider the impact of the Webb-Kenyon Act, a federal statute that both pre-dates and post-dates the adoption of the Twenty-First Amendment and that serves to strip alcohol beverages of their normal interstate commerce protection, thus allowing a state to impose the kind of regulation on the importation of alcohol beverages that is at issue here.

ARGUMENT

I. MICHIGAN'S APPROACH TO REGULATION IS PERMISSABLE UNDER THE PLAIN LANGUAGE AND JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

Drink is in itself a creature of God, and to be received with thankfulness.

Increase Mather, 1673

The thing has arrived to such a height, that we are actually threatened with becoming a nation of drunkards.

- Greene and Delaware Moral Society, 1815

The production, sale and regulation of alcohol beverages have long been a source of controversy as well a fertile area for litigation within the United States. In the early days of the nation, the new federal government sparked an agrarian uprising—known as the "Whiskey Rebellion"—when it sought to impose, for the first time, a federal excise tax on distilled spirits, in part to fund the debt of the Revolutionary War.

While the federal government thus staked a "claim" to its right to tax alcohol beverages, it generally did not seek to impose other restrictions on its production and distribution. That responsibility fell to the individual states, which sought to exercise control over the product's distribution by licensing sellers, an action that was upheld by this Court in *The License Cases*, 46 U.S. 5 How. 504 (1847). It should be noted that, even today, the federal government's regulation of alcohol beverages outside of the tax area is limited to scrutiny of certain trade practices. The "imposition" of a national minimum drinking age was not done directly, but rather as an exercise of Congress' spending power. In fact, this Court questioned whether Congress even possessed the power to directly impose a national minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

A strong anti-alcohol movement emerged in the latter half of the nineteenth century. Several states attempted to legislate a totally "dry" environment in which the sale of alcohol was prohibited, the National Prohibition Party was formed in an effort to impact federal elections, and such groups as the Women's Christian Temperance Union and the Anti-Saloon League were born out of a concern about the adverse effect that excessive consumption of alcohol beverages was having on the country's moral fabric.

Some states opted for virtually unrestricted commerce in alcohol beverages while others opted to be "dry," that is, they prohibited virtually all traffic in alcohol beverages. Still others adopted "local option" statutes, giving cities, towns and municipalities the authority to determine whether to allow the sale and distribution of alcohol beverages.

Although Congress generally adopted a "hands-off" policy with regard to alcohol beverage regulation, except for federal taxation of the product, state regulation of trade in alcohol beverages soon ran afoul of the Constitution's grant to Congress—and Congress alone—of the authority to regulate commerce among the states. U.S.Const. Art. I., Sec. 8, cl. 3. Expressly overruling a 50-year-old precedent, this Court declared invalid an Iowa law regulating the sale of alcohol beverages which had been shipped from outside the state. *Leisy v. Hardin*, 135 U.S. 100 (1890).

Reacting to *Leisy*, Congress passed the so-called "Original Packages Act," also known as the Wilson Act, which declared that, upon arrival into a state, alcohol beverages became subject to the regulatory scheme of the state, in the same manner as alcohol beverages produced within the state. Act of August 8, 1890, c. 728, 26 Stat. 313 (current version at 27 U.S.C. §121).

Passage of the Wilson Act, however, did not totally clarify the ability of states to regulate trade in alcohol beverages within their borders. Although the constitutionality of the Wilson Act was upheld, *In re Rahrer*, 140 U.S. 545 (1891), in *Rhodes v. Iowa*, 170 U.S. 412 (1898), this Court held that, although alcohol beverage products lose their character as items of interstate commerce *after* their delivery into a state, the Wilson Act did not authorize the laws of a state to be applied to such merchandise while in transit and prior to delivery to a consignee within the state.

Similarly, in *Vance v. W.A. Vandercook Company*, 170 U.S. 438 (1898), this Court declared that the Wilson Act did not recognize the right of a state to prevent an individual from ordering alcohol beverages from outside the state for his own consumption.

Congress moved to close this "loophole," but not until 1913 did it succeed in passing, over the veto of President William Howard Taft, what is now commonly referred to as the Webb-Kenyon Act. Act of Mar. 1, 1913, c. 90, 37 Stat. 699 (current version at §27 U.S.C. 122). The title of the Act—"An Act divesting intoxicating liquors of their interstate character in certain cases"—is instructive in determining the motivation for its adoption. Rep. Clayton, Chairman of the House Judiciary Committee, which extensively debated the bill prior to its consideration by the full House of Representatives, clearly explained its purpose when he declared

> The purpose (of the bill) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed police regulations restricting or forbidding the sale of liquor to better enforce those regulations.

49 Cong. Rec. H2864 (daily ed. February 8, 1913).

This Court upheld the validity of the Act, holding that there was no reason to state that because Congress had a power to forbid movement of a product in interstate commerce, it did not also have the authority to establish a regulation making it impossible for one state to violate the prohibition of the law of another state in interstate commerce. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). That analysis is still good law today.

This Commerce Clause exception was quickly swallowed up by the national experiment known as Prohibition when the Eighteenth Amendment was declared to have been ratified by

the requisite number of states on January 29. 1919. Section 1 of the Eighteenth Amendment not only banned the manufacture, sale or transportation of alcohol beverages within a state, but it also prohibited the importation into any state of alcohol beverages originating in another state.

When it became apparent that Prohibition was a failure, Congress moved to undo its Constitutional underpinning by adopting the Twenty-First Amendment; ratification was completed on December 5, 1933. Congress could have completed its effort merely by adoption of Section 1 alone. That would have repealed the ban on activity within a state, as well as the prohibition on importation of alcohol beverages into any state. However, Congress chose to add Section 2, which plainly declares

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

To underscore the Congressional statement on the impact of the Amendment, the Webb-Kenyon Act was subsequently re-enacted without change 1935. Act of Aug. 27, 1935, c. 740 §202(b), 49 Stat. 877 (current version at 27 U.S.C. §122).

These two affirmative statements of Congressional intent make it crystal clear that Congress meant to create an exception to the normal rules of interstate commerce regulation in the case of alcohol beverages. As the Constitution's sole regulator of interstate commerce, Congress clearly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Using its authority, Congress could have restricted a state's authority to ban or regulate imports only in situations where the state treated in-state products in the same manner, but it did not. Nowhere in the plain language of the Twenty-First Amendment is there a hint that, for the purpose of regulating

transportation or importation into any state, a state must treat out-of-state alcohol beverages in the same manner in which it treats in-state alcohol beverages.

This Court promptly recognized the impact of the Twenty-First Amendment, noting that it "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This Court has continued to recognize that the Twenty-First Amendment "primarily created an exception to the normal operation of the Commerce Clause," *Craig v. Boren*, 429 U.S. 190, 206 (1976), and that the resultant authority of the state under the Amendment over importation of alcohol beverages "is transparently clear." *Id.* at 207.

Even as this Court later appeared to suggest that the grant of authority under the Twenty-First Amendment must be balanced with Congress' power under the Commerce Clause under certain conditions, the scope of those conditions has been made abundantly clear:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 110 (1980)

In its most recent review of the Twenty-First Amendment, this Court noted that Section 2 delegated to the states the power "to prohibit commerce in" alcohol beverages and further stated that state "regulatory power over this segment of commerce is therefore largely 'unfettered by the Com-

merce Clause.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996), citing *Ziffrin*, supra.

This Court has thus clearly demarcated the scope of the Twenty-First Amendment: states have "virtually complete control" over the importation of alcohol beverages. As to "other regulations," however, the state's authority must be balanced against the Commerce Clause.

In holding the Michigan statute invalid because of a conflict with the Commerce Clause, the court below misapplied this long-standing and clear interpretation of the Twenty-First Amendment. The lower court contended that the "proper approach" in this case was to apply traditional dormant Commerce Clause analysis and, if the state's approach to regulation was found to be unconstitutional, to determine whether the unconstitutionality was somehow "saved" by a Twenty-First Amendment analysis.

The *amici cuirae* believe that this approach is erroneous; the lower court should have first looked at the plain language of the Twenty-First Amendment to determine its applicability to the situation at hand before going on to review other sections of the Constitution, not the other way around.

Further, the court below also erroneously relied on *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) to support its reasoning. That case involved a state's regulation of alcohol beverages—in this case, taxation—once the beverages had arrived into the state. The state did not seek to justify the tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Amendment; in fact, the state acknowledged that the purpose of the discriminatory taxation scheme was to promote a local industry *Id.* at 276. Indeed, the Twenty-First Amendment claim in that case was not even raised by the state until Supreme Court consideration.

Thus, based on the plain language and judicial interpretation of the Twenty-First Amendment, the opinion of the court below should be reversed and the validity of Michigan's statute upheld. By the same reasoning, New York and other states should be permitted to regulate imports of alcohol beverages in the manner they see fit, even if that regulation involves differential treatment of in-state products.

II. MICHIGAN'S STATUTE CLEARLY FALLS WITHIN THE "CORE POWERS" OF THE TWENTY-FIRST AMENDMENT THAT HAVE BEEN RESERVED TO THE STATES

Even if one takes the position that a balancing of the Twenty-First Amendment and the Commerce Clause should be considered, it is readily apparent that the court below erred in its construction of a state's "core powers" under the Amendment that are to be given precedence over the Commerce Clause.

In its brief discussion of "core powers," the court below erroneously dismissed virtually out of hand the notion that Michigan's direct shipment ban promotes "temperance, ensuring orderly market conditions, and raising revenue" which are the state's "core powers" under the Twenty-First Amendment that this Court has long recognized. *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

Other courts have also shed light on a state's "core powers." For instance, mere regulation of the sale of alcohol beverages is not sufficient to overcome a Commerce Clause challenge; a state's regulation "must effect the structure of the state liquor distribution system." *Pete's Brewing Co. et al. v. Whitehead*, 19 F.Supp.2d 1004, 1020 (W.D.Mo. 1998).

There can be no question that Michigan's decision to prohibit the direct shipment of alcohol beverages from a location outside of the state to consumers within the state is

an integral part of the structure of the liquor distribution system that the state has chosen to implement. The sale of alcohol beverages does not take place in a free and unregulated market. Buyers of alcohol beverages must be twenty-one years of age or older. Sellers are limited to those who have been licensed by the state after an exhaustive check of their background. Many licensed sellers, especially those at the production or wholesale level, are frequently required to remit excise taxes to the state and licensed retailers are required to collect and remit applicable sales taxes when the product is transferred to the ultimate consumer. Many jurisdictions (e.g., cities and counties) have opted to be totally "dry," prohibiting the sale of alcohol beverages altogether.

To strike down a state's statute as an impermissible burden on interstate commerce outside of the state's "core powers" under the Twenty-First Amendment would undermine a state's ability to structure any kind of distribution system, and lead to a totally unregulated market in alcohol beverages. *Every* regulation of in-state producers and sellers would have to be applied equally, and could lead to virtually unrestricted trade in alcohol beverages, not only to consumers, but to in-state retailers as well. If out-of-state sellers are permitted to ship into a state directly to the state's consumers, the state will lack the ability to effectively enforce its laws governing age of purchaser, background of sellers and collection of revenue, all of which are central to the system of distributing and selling alcohol beverages.

Michigan has not rendered it impossible for out-of-state vendors to reach its consumers. It has merely structured a system—and done so within the parameters permitted under the Twenty-First Amendment—that requires licensing and tax collection. Out-of-state vendors who wish to reach Michigan consumers may do so within the regime laid out by the state.

While some may believe that there is a less intrusive way for a state to regulate the importation of alcohol beverages

into its borders, the Twenty-First Amendment clearly gives the state legislature, and not the courts, the power to determine what kind, if any, importation to allow, and under what circumstances. This Court should not now undermine the plain meaning of the Twenty-First Amendment and its own long-standing interpretations of that Constitutional provision by the judicial insertion of conditions that have not heretofore been recognized.

III. EVEN IF ONE ASSUMES THAT THE COMMERCE CLAUSE "TRUMPS" THE POWER ACCORDED TO THE STATE UNDER THE TWENTY-FIRST AMENDMENT, CONGRESS HAS UTILIZED ITS COMMERCE CLAUSE AUTHORITY TO DELEGATE CONTROL TO THE STATES

There is yet another reason, however, why Michigan's regulatory approach must be permitted to stand. Even if one accepts the reasoning of the court below, which the *amici curiae* believe is erroneous, one is left with Congress' utilization of its interstate commerce power in the Webb-Kenyon Act.

As has been indicated previously, that Act both pre-dates and post-dates adoption of the Twenty-First Amendment. Its purpose was unmistakably clear: "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Clark Distilling Co.*, supra.

Placed in the context of the earlier Wilson Act, the Webb-Kenyon Act represents a "further surrender to the states of the constitutional power of Congress to regulate interstate commerce in intoxicating liquors." *Dugan v. Bridges*, 161 F.Supp. 694, 704 (D.N.H.), appeal dismissed 300 U.S. 684 (1936). The Act shows an intent to give the states an "entirely free hand" in regulating the importation of alcohol beverages,

Id., and there appears to be no prohibition against discrimination between liquors produced within the state and those produced outside the state. Put another way, the Act sanctions differential treatment of sellers, depending on their location.

The re-enactment of the Webb-Kenyon Act in 1935, subsequent to the adoption and implementation of the Twenty-First Amendment, underscores the principle that the Amendment does not withdraw from the states the power surrendered to them by the passage of the Act, regardless of whether one views the Act as a power abdicated that previously had been exercised by Congress, or as one having always been retained or reserved under the police powers of a state. *Id.* at 707.

The chronological timing of Congress' action in re-enacting the Act subsequent to the Twenty-First Amendment and its clear language indicate that, notwithstanding any other Commerce Clause analysis, Congress *did* intend to allow the states a free hand to regulate, or even prohibit, the interstate shipment of alcohol beverages into their borders.

To hold otherwise would render the Act and more than a century of Congressional pronouncements on the power of states a nullity.

While a balancing test against the Commerce Clause may be appropriate in certain instances of state enactments arguably supported by the power bestowed under the Twenty-First Amendment—a balancing test that, as stated, the *amici* do not believe is appropriate here—there can be no balancing test in construing what, in effect, is the grant of authority to the states under the Webb-Kenyon Act. Congress clearly determined to cede a portion of the federal government's interstate commerce authority to the states, and whether one agrees with the manner in which the state has exercised its authority or not, the clear result must be a deferral to

state action in the area of regulating importation of alcohol beverages.

There is nothing more basic to the structure of a state's alcohol beverage distribution system than the ability to determine under what conditions the product may be brought into the state. Alcohol beverages are one of a handful of products (tobacco and firearms being two others) that the government has determined warrant special treatment by means of controlling who may sell and who may purchase the product. There is not now, nor has there been for more than 150 years a "free" market in alcohol beverage distribution and sale. To disallow Michigan's (and other states') lawful attempt to control and regulate the distribution of this product would mean that virtually no importation regulation would be allowed to stand, leading to the uncontrolled and uncontrollable distribution of alcohol beverages.

This case is not about whether direct shipping of alcohol beverages to consumers should be allowed or prohibited. It is about the right of each state, acting pursuant to the Twenty-First Amendment, to decide for itself how it wishes to deal with its alcohol beverage distribution system.

Alcohol beverages should not be turned into the functional equivalent of polo shirts or blue jeans merely because a trier of fact believes there is a better way to regulate the product's flow.

CONCLUSION

For the reasons set forth herein, the decision of the Sixth Circuit should be overturned and the case remanded for further proceedings not inconsistent with the decision herein. The decision of the Second Circuit in a companion case should be upheld.

Respectfully submitted,

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